No.

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

JEREMY FLAX, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This automotive design-defect case involves the largest judgment ever upheld by the Tennessee Supreme Court. The jury imposed a $98 million punitive damage award (later reduced to $13 million) for a minivan seat design that exceeded federal strength requirements and complied with industry standards—despite a statutory presumption that not even compensatory liability is appropriate if a manufacturer complies with governmental safety standards. The case presents the following questions:

1. Whether Tennessee law deprives defendants of "fair notice" and thus violates the Due Process Clause if it permits the imposition of liability for punitive damages without regard to any objective indicators of reasonable conduct—including governmental safety standards, industry custom, and the existence of a genuine debate about what the law requires.

2. Whether the Tennessee Supreme Court's reinstatement of the $13 million punitive damage award violates the Due Process Clause, where that court (a) ignored the defendant's compliance with objective indicia of reasonable conduct; (b) expressly recognized but treated as meaningless the fact that the comparable penalty guidepost mandated by *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), totaled $125,000 and thus "compel[led]" a much lower amount; and (c) disregarded this Court's teaching in *State Farm Mutual Auto Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), that a 1:1 ratio is generally the constitutional maximum for "substantial" compensatory damage awards, i.e., those over $1 million.

3. Whether the procedural bar used by the Tennessee Supreme Court to preclude review of the prejudicial impact of nonparty harm evidence and argument under *Philip Morris USA* v. *Williams*, 549 U.S. 346 (2007), is an independent and adequate state ground for decision.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Rachel Sparkman was a plaintiff-appellant below and is a respondent in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Chrysler LLC is indirectly wholly owned by Chrysler Holding LLC, and 80.1% of Chrysler Holding LLC is owned by investment funds or other entities affiliated with Cerberus Capital Management, L.P. The remaining 19.9% of Chrysler Holding LLC is owned by affiliates of Daimler AG.

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Petitioner DaimlerChrysler Corporation, now Chrysler LLC ("Chrysler") respectfully submits this petition for a writ of certiorari.[1]

OPINIONS BELOW

The opinion of the Tennessee Supreme Court (App. 1a-83a) is not yet published but is electronically reported at 2008 WL 2831225. The opinion of the Tennessee Court of Appeals (App. 84a-153a) is not published but is electronically reported at 2006 WL 3813655. The opinion of the Circuit Court (App. 165a-176a) is not published but is electronically reported at 2005 WL 1768725.

JURISDICTION

The Tennessee Supreme Court denied Petitioner's Petition for Rehearing on November 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

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[1] DaimlerChrysler Corporation became DaimlerChrysler Company LLC, by conversion effective March 31, 2007, and DaimlerChrysler Company LLC became Chrysler LLC, effective July 30, 2007.

STATEMENT

This case demonstrates that the lower courts have not heeded this Court's repeated warnings that punitive damage awards must be consistent with federal due process standards. Those standards govern not only whether a punitive award is excessive, but also whether it is permissible in the first place.

First, in a sharply split decision, and over two insightful dissents, the Tennessee Supreme Court departed from longstanding, traditional common law principles and applied a new rule in this case that directly contravenes the Due Process Clause's prohibition against punishment based on "standards" that are so amorphous and subjective that they neither give "fair notice" to defendants of what the law requires nor prevent the arbitrary infliction of punishment. The Tennessee Supreme Court reinstated the jury's punitive damage verdict, finding that Chrysler acted "recklessly" when it designed a minivan seat, even though it far exceeded federal safety requirements and was consistent with the design used in most vehicles on the road today. It did so despite the fact that Tennessee law, by statute, provides a presumption that no liability—not even compensatory damages—will be imposed if a manufacturer complies with governmental safety standards. *See* T.C.A. § 29-28-104.

While this Court has previously suggested that the due process standards for imposing punitive damage liability are properly subjected to *more* rigorous constitutional scrutiny than the amount of such damages awarded, *see Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 24 n.12 (1991) (contrasting more lenient due process review applicable to the *size* of a penalty with more searching scrutiny used to address imposition of liability in the first instance), this

Court has never squarely addressed this issue. The Court should do so now.

Second, the Tennessee Supreme Court reinstated the $13 million punitive damage award, on top of a compensatory award of $2.5 million, despite the fact that it far exceeded the comparable civil or criminal penalties of $125,000. Certiorari is necessary to resolve the important—and much disputed—question whether and how courts must ensure that punitive damages are in line with comparable penalties. As the Tennessee Supreme Court recognized, the lower courts are "experience[ing] . . . frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether." App. 35a. *Compare, e.g.*, *Paracelsus Health Care Corp.* v. *Willard*, 754 So. 2d 437, 445 (Miss. 1999) (third guidepost unaddressed because no comparable penalty was found), *with FDIC* v. *Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) (lack of comparable statutory penalties is a basis for reducing award).

The Tennessee Supreme Court's decision conflicts with the decisions of other lower courts, including the very circuit in which it is located, that reduce punitive awards that exceed comparable penalties. *See, e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 607-08 (6th Cir. 2006) (holding that "a $3 million punitive damage award is excessive in light of comparable civil penalties" where "the maximum civil penalty that could be imposed for a design defect was $1,000 per vehicle, up to a maximum of $800,000 for a related series of violations" and reducing award to $471,258.26). *See also Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (conflict between decisions of state and federal courts in the same circuit is grounds for certiorari). This critical constitutional issue necessarily arises *each and every* time a court reviews a punitive damage award for excessiveness under the Due Process Clause.

And the court also reinstated the award, despite its greater than 5:1 ratio of compensatory to punitive damages, by ignoring this Court's admonition that a 1:1 ratio is required for "substantial" compensatory damage awards such as the one in this case—another issue on which the lower courts are in complete disarray. *Compare, e.g.*, *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156-57 (6th Cir. 2007) (holding $400,000 compensatory damage award was "substantial" and remitting $2.2 million punitive damage award to $400,000).

Third, and finally, the court relied on an apparently unprecedented state-law procedural rule to reject Chrysler's argument that the jury was erroneously allowed to base its decision on alleged harm to nonparties, even though such a rule cannot bar the vindication of federal constitutional rights. Thus, this Court should, at a minimum, hold this case pending its decision in *Philip Morris USA* v. *Williams*, No. 07-1216 (U.S.).

1. A speeding pick-up truck traveling between 55-70 miles per hour in a 35 mile-per-hour zone rear-ended Respondents' 1998 Dodge Caravan. App. 4a n.2. The severe collision caused the Caravan's front seats to absorb energy and yield rearward, as designed. The front passenger's seat collided with Respondents' son Joshua, who was seated in the middle row of the minivan and suffered a fatal head injury. But the minivan's design successfully protected the other five passengers, who survived without serious injury. Respondents sued Chrysler, seeking compensatory and punitive damages for their son's allegedly wrongful death and for the emotional distress of his mother. App. 5a-6a.

2. At trial, Respondents argued that the minivan's design was defective because the front seats were not sufficiently rigid, while Chrysler's defense

was that its "yielding" design protects the greatest number of people in the greatest number of accidents. Chrysler established, and Respondents conceded, that Chrysler's design exceeded by almost three times the relevant federal safety regulation, 49 C.F.R. § 571.207, which mandates that a seat be strong enough to withstand a rearward movement of 3,300 inch-pounds. App. 140a. And Respondents' expert admitted that the type of seat and strength of the seatback Chrysler used were "in the average of the predominant number of vehicles on the road" in 1998. App. 148a.

The trial court allowed Respondents, over Chrysler's objection, to present evidence of 37 other accidents, 25 of which occurred *after* the sale of their minivan. In addition to contemporaneously objecting, Chrysler also asked the trial court to instruct the jury not to consider the evidence. App. 232a n.19. That request also was denied. App. at 233a n. 20. Respondents' counsel urged the jurors that each bore an "immense burden" to "keep children out of the hospitals and out of the morgues," and that if they did not "drop the hammer" on Chrysler by imposing a multi-million dollar punitive damage award, "[f]or the rest of your lives, you're going to have to ask yourself the question, did I do enough?" App. 267a.

3. Despite the fact that Tennessee law "restrict[s] the awarding of punitive damages to cases involving only the most egregious of wrongs," *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992), and federal guidelines and industry standards demonstrate that Chrysler's design was not objectively unreasonable, the trial court allowed the punitive damage claim to go to the jury. The jury found that Chrysler acted "recklessly" in designing the Caravan. App. 162a.

After apportioning half of the fault to the other driver, the jury held Chrysler liable for $3.75 million in total compensatory damages for wrongful death and negligent infliction of emotional distress, and $98 million in punitive damages, resulting in a ratio of approximately 26:1. The trial court concluded that the jury's punitive damage award was unconstitutionally excessive, and reduced it to $20 million. App. 6a-7a.

4. The Court of Appeals unanimously reversed the *entire* punitive damage award, holding that Respondents failed to prove by clear and convincing evidence that Chrysler acted intentionally or recklessly. The Court discussed, at length, Chrysler's compliance with federal regulatory standards, and the fact that Chrysler's seatback design was consistent with common wisdom in the industry. App. 140a-142a. It held that Chrysler's adherence to "industry customs and standards" is "relevant when determining whether [its] conduct is reckless," and that Chrysler's compliance with all federal regulatory standards "weighs heavily . . . against a clear and convincing finding of recklessness." App. 149a, 142a. Regarding the admission of evidence of at least 25 dissimilar accidents, the Court of Appeals held that it was error for the trial court not to instruct the jury that it could not consider these accidents when imposing punitive damages. App. 143a.

5. The Tennessee Supreme Court granted review and, in a split decision, affirmed the Court of Appeal's denial of Respondents' claim for negligent infliction of emotional distress, thus reducing the compensatory award to $2.5 million, but reinstated the bulk of the punitive damage award—$13,367,345—for wrongful death. The court reinstated the award because it found sufficient evidence to support the jury's finding of recklessness, despite the fact that Chrysler undisputedly complied with federal regula-

tions and was therefore "entitled . . . to a rebuttable presumption that its product was not unreasonably dangerous" under Tennessee law. App. 27a (citing T.C.A. § 29-28-104). The court rejected without specifically addressing Chrysler's argument that imposing punitive damage liability under these circumstances violated the Due Process Clause. App. 27a-28a, 212a-214a.

The court attempted to analyze the constitutionality of the size of the award under the three guideposts set forth in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996): (1) "reprehensibility of the defendant's conduct"; (2) "ratio between the punitive damage award and the actual harm suffered by the plaintiff"; and (3) a comparison of "the punitive damage award to civil or criminal penalties that could be imposed for similar conduct." App. 29a. It held that the award was permissible under the first and second guideposts, even though it recognized that "[t]here is . . . some doubt as to the propriety of [the ratio of the punitive damage award to the actual harm suffered by the plaintiff] of 1 to 5.35 because the United States Supreme Court has suggested that a ratio of more than 1 to 4 approaches the outer limits of constitutionality," and "[t]he Court has also suggested that a ratio of 1 to 1 may be all that is permissible in cases where compensatory damages are 'substantial.'" App. 32a-33a.

In addition, because the maximum comparable penalty under Tennessee law is $125,000, the court noted that "the result recommended by the third guidepost is dramatically at odds with the result suggested by the first two." App. 35a. But the court admitted that it was "*unsure* how to reconcile the third guidepost." App. 36a (emphasis added). Thus, while recognizing that *Gore*'s third guidepost "seems to compel" a different conclusion, the court nonetheless ignored this and held that the punitive damage

award did not offend due process. App. 36a. In so doing, the court noted the confusion regarding the third guidepost and observed that other "courts have experienced similar frustrations when attempting to apply the third guidepost, and *some have chosen to ignore the third guidepost altogether.*" App. 35a (emphasis added). Rather than follow this Court's decisions in *Gore* and *State Farm*, and other courts that faithfully apply them by remitting punitive damage awards that exceed comparable penalties, the court followed those courts that "have chosen to ignore the third guidepost altogether" and reinstated the full $13,367,345 punitive damage award. App. 36a.

While the Tennessee Supreme Court held that the trial court's admission of evidence of 25 post-sale incidents was erroneous, it concluded that it was harmless. Chrysler argued that Respondents "repeatedly invited the jury" to punish Chrysler for harm caused to "third parties not before the Court," and that the trial court erred in not instructing the jury to ignore the improper evidence and argument. App. 216a. The Tennessee Supreme Court mentioned only the latter argument, and did not even address the unconstitutionality of being punished for alleged harm to *nonparties*, which Chrysler raised at every stage of the litigation. App. 37a; App. 203a-205a, 214a-220a, 238a-243a, 254a-264a. The court focused exclusively on the fact that Chrysler did not raise a specifically instructional issue in the Court of Appeal, and thus apparently determined that this Court's clear prohibition on punishing defendants based on harm to nonparties was supposedly limited to the *jury instruction* context.

Two of the five Justices dissented from the court's reinstatement of the punitive award. Justice Koch emphasized the need for the appellate court to "engage in an independent, de novo evaluation of the three 'guideposts' for punitive damages first required

in [*Gore*]." App. 57a. He explained that "this case is neither close nor difficult," because Respondents "failed to prove by clear and convincing evidence that [Chrysler] acted so recklessly with regard to the design, construction, and marketing of the 1998 Dodge Caravan." App. 57a-58a. Justice Clark also dissented from the reinstatement of the punitive damage liability finding, stating that the erroneous introduction of the post-sale incidents required a new trial on punitive damages. App. 71a.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO CLARIFY HOW THE DUE PROCESS "FAIR NOTICE" PRINCIPLE APPLIES TO STANDARDS FOR DETERMINING PUNITIVE DAMAGE LIABILITY

By approving punishment for conduct that complied with every objective indicator of what the law required, the Tennessee Supreme Court dramatically deviated from traditional common law punitive damage standards, which have historically sanctioned punishment only for conduct that was objectively unreasonable. In the process, the Tennessee Supreme Court's adoption of a wholly subjective and ad hoc "standard" flatly contravenes the "'elementary notions of fairness'" and "'fair notice . . . of the conduct that will subject [one] to punishment'" that are at the core of this Court's due process jurisprudence. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003) (quoting *Gore*, 517 U.S. at 574).

Although *State Farm* and *Gore* focused on the failure to provide fair notice of the *severity* of the punishment that could be imposed, the right to fair notice of the *conduct* that can give rise to punishment in the first instance has an even longer pedigree and is even more strictly enforced. As the Court

put it in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 703 (quotation omitted).

1. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *see also City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (due process requires "the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"). Laws must therefore provide explicit standards for those who apply them. A law without such standards "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09; *Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983) (law unconstitutionally vague if it fails to "establish minimal guidelines to govern law enforcement" and confers upon "policemen, prosecutors, and juries" "a standardless sweep . . . to pursue their personal predilections").

In short, a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted).

2. Just last Term, this Court explained that, historically, whether conduct could be found to be "reck-

less" and therefore punishable was based on objective standards. *See Safeco Ins. Co. of Am.* v. *Burr*, 127 S. Ct. 2201, 2215-17 (2007). "It is this high risk of harm, *objectively assessed*, that is the essence of recklessness at common law." *Id.* at 2215 (emphasis added) (citing W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS § 34, p. 213 (5th ed. 1984)). Although the Court "disagree[d]" with the *Safeco* defendant's analysis of what the law required, because the defendant's interpretation of its legal duties, "albeit erroneous, was not objectively unreasonable," the Court held that the defendant could not, as a matter of law, be deemed to have acted "willfully" or with "reckless disregard." *Safeco*, 127 S. Ct. at 2215-17. "Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id.* at 2216 n.20.

In *Safeco*, the Court analogized the traditional common law definition of punishable "recklessness" to the law of qualified immunity, where the relevant inquiry is "whether an action was reasonable in light of legal rules that were 'clearly established' at the time." *Id.* at 2216 (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)). Under this analysis, if the defendant's conduct is reasonably debatable, this does not permit—contrary to the Tennessee Supreme Court's conclusion—a jury to overlook compliance with objective indicia of reasonable conduct, but rather requires judgment as a matter of law. "[I]f officers of reasonable competence could disagree on th[e matter at] issue, immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). And in *United States* v. *Lanier*, 520 U.S. 259 (1997), this Court employed terms strikingly similar to those of its punitive damages cases in explaining that the qualified

immunity test for public officers is "simply *the adaptation of the fair warning standard* to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* at 270-71 (emphasis added).

3. This Court has applied due process principles to prohibit radical departures from common-law protections on arbitrary punitive damage awards. For example, in *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415 (1994), the Court held that a state's "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Id.* at 430. "Traditional practice provides a touchstone for constitutional analysis," and "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.*; *see also id.* at 436 (Scalia, J., concurring) ("The depravation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.").

Historically, therefore, defendants have been able to rely on objective standards when ordering their conduct so as to avoid punitive damages. Indeed, numerous courts have held that compliance with objective indicators of reasonable conduct, such as industry custom and federal standards, and the existence of a reasonable disagreement over what the law entails, precludes punitive damages.[2]

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[2] **Industry custom and standards**: *See, e.g.*, *Drabik* v. *Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and custom serves to negate

4. As enunciated by the Tennessee Supreme Court in this case, the Tennessee standard for "recklessness" is a clear break from this traditional common-law practice. The Tennessee Supreme Court *agreed* that Chrysler was "in compliance with federal regulations and custom within [the] industry," and therefore "entitled to a rebuttable presumption that its product was not unreasonably dangerous." *See* App 27a (citing T.C.A. § 29-28-104). Nonetheless, the court found Chrysler's conduct to be sufficiently "reckless[]" to warrant punitive damages. App. 27a. The court pointed to no objective indication of any recklessness on Chrysler's part. Instead, it simply held that the *jury*'s finding that Chrysler's conduct was reckless was sufficient to overcome all *objective* indicators of reasonableness.

Without this common-law protection, manufacturers such as Chrysler are left without objectively verifiable standards for determining whether a product's design can give rise to punitive damages. The lack of fair notice is exacerbated here by the fact that Tennessee law simultaneously provides a presumption that no liability—not even compensatory

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[Footnote continued from previous page]

conscious disregard and to show that the defendant acted with a nonculpable state of mind"). **Federal safety standards**: *See, e.g., Richards* v. *Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (granting judgment on punitive damages where, inter alia, "the record demonstrates that [the manufacturer] complied with all requisite Federal Motor Vehicle Safety Standards"); *Prosser and Keeton*, *supra*, § 36, at p. 233 n.41 ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages."). **Reasonable disagreement**: *See, e.g., Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award when, inter alia, "there is a genuine dispute in the scientific community" regarding reasonableness of design).

damages—will be imposed on manufacturers who comply with government safety regulations. *See* T.C.A. § 29-28-104. The Tennessee standard for punitive damages thus authorizes individual lay juries to make an after-the-fact policy decision as to a complex product design and override the legislature's determination that compliance with governmental safety standards is presumed to be reasonable, and its application is necessarily unpredictable. As one commentator has observed, "[t]he very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree" and "[t]here is therefore a vast defect 'no man's land' where a manufacturer has no idea whether it is on the right or wrong side of the law." David G. Owen, *Problems In Assessing Punitive Damages against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 37 (1982).

This means that Chrysler and other manufacturers "must necessarily guess at its meaning" and hope that the juries and courts will agree with them. *Connally*, 269 U.S. at 391. In fact, under the Tennessee Supreme Court's ruling, Chrysler could be severely punished simply because a single jury concludes that a single company employee believed the design created too much risk, even though all of the other employees, including engineers and company executives, other manufacturers, and the federal government disagreed. This ruling "violates the first essential of due process," *id.*, and conflicts with many decisions of this Court and other courts.

5. This question is important and recurring and deserves this Court's attention. This Court has repeatedly "admonished that 'punitive damages pose an acute danger of arbitrary deprivation of property,'" *State Farm*, 538 U.S. at 417 (citation omitted), and expressed "concerns over the imprecise manner

in which punitive damages systems are administered." *Id.* The Court also has recognized that "[v]ague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* at 418; *see also Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., joined by Marshall, J., concurring) (warning of the due process dangers that arise when juries are told "little more than . . . to do what they think is best" and are thus "left largely to themselves in making this important, and potentially devastating, decision"); *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment) (noting that a court's failure to give the jury proper standards for imposing punitive damages "appears inconsistent with due process").

Allowing a jury to disregard the considered judgment of federal regulators and comparable conduct by other manufacturers inevitably results in *ex-post* judgments based on hindsight rather than reasonable determinations about the particular design at issue. *See Carroll* v. *Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) ("The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. . . . And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states."); Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*, in Cass R. Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE 96, 108 (2002) ("hindsight bias is almost inevitable when ju-

rors make punitive damages decisions"). Indeed, if manufacturers can be punished for selling products that reasonable people could conclude are not defective, the only way they can modify their conduct to avoid punishment is to stop selling all products that might be subject to criticism by a plaintiff's expert. *See United States* v. *Powell*, 423 U.S. 87, 93 (1975) (explaining why prohibition against charging an "unreasonable" price for sugar was unconstitutionally vague: "Engaged in a lawful business which Congress had in no way sought to proscribe, [the defendant] could not have charged any price with the confidence that it would not later be found unreasonable.") (emphasis omitted).

Product design cases thus pose a particularly high risk that juries will "use their verdicts to express biases against big businesses." *State Farm*, 538 U.S. at 417 (citation omitted). This Court should grant review and make clear that due process forbids such arbitrary punishment.

II. REVIEW IS NECESSARY TO RESOLVE THE LOWER COURTS' CONFUSION REGARDING APPLICATION OF THE DUE PROCESS GUIDEPOSTS

The Tennessee Supreme Court's reinstatement of a grossly and unconstitutionally excessive punitive damage award reflects not only its erroneous dismissal of all objective indicia of reasonable conduct, but also the extensive confusion in lower courts regarding the application of the due process guideposts this Court first enunciated in *Gore*. The Tennessee court's reprehensibility analysis incorrectly applied the first guidepost by ignoring the objective factors indicating that Chrysler's conduct lay, at most, at the lower end of the reprehensibility spectrum. App. 31a-32a. Perhaps even more critically, the

Tennessee Supreme Court treated the "comparable penalty" guidepost as virtually irrelevant *because* the court expressly recognized that its application would have required that the jury's award be substantially reduced, and "[w]e are unfortunately left with little guidance as to how to resolve this discrepancy." App. 35a. In addition, the court declined to find that the $2.5 million compensatory damage award required a 1:1 ratio because, it said, "the United States Supreme Court has made no effort to demonstrate when damages are 'substantial.'" App. 33a.

The confusion expressed frankly by the Tennessee Supreme Court is widespread throughout the state and federal courts, and amply warrants review.

A. The Lower Courts Are Split Regarding The "Comparable Penalty" Guidepost

1. This Court has set forth three factors for gauging the constitutional propriety of the size of a punitive damage award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575). *See also Gore*, 517 U.S. at 583 (the Court has also looked to "criminal penalties that could be imposed").

The third, or comparable penalty, guidepost provides a particularly important check on excessive and arbitrary awards by offering an objective referent that reflects deference to legislative judgments concerning the appropriate size of monetary penalties in analogous circumstances. Comparable penal-

ties are a critically important guidepost because they provide fair notice to defendants of the potential punishment. As a result, "in determining whether an award of punitive damages is excessive[, courts] should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *Gore*, 517 U.S. at 583 (quoting *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part)). This is the very purpose of the third due process guidepost.

In each of this Court's cases involving excessive punitive damage awards, it has looked to the comparable-penalty guidepost and reduced awards that are not comparable. In *Gore*, where "[t]he maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000," the Court held that the "$2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance." 517 U.S. at 584. In *State Farm*, the Court found it of constitutional significance that the $10,000 comparable civil sanction was "dwarfed by the $145 million punitive damages award." 538 U.S. at 428. The Court also noted that "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Id.*

2. The Tennessee Supreme Court expressed its uncertainty and confusion on how to apply this guidepost, and it is clear that it would not have upheld the punitive damage award below but for its misinterpretation of the third guidepost. The court correctly recognized that "[a] reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." App. 29a (in-

ternal quotations and citations omitted). The court acknowledged that "[t]hese legislative judgments are relevant because they provide defendants with notice of the severity of the penalty that may be imposed upon them." App. 29a-30a. It then identified "[t]he statute that most closely expresses the Tennessee General Assembly's judgment concerning the wrongfulness of [Chrysler]'s conduct": the reckless homicide statute, which limited fines to $125,000. App. 33a-34a (citing T.C.A. §§ 39-13-215, 40-35-111(c)(4)).

But the court noted a tension between its analysis of the first two guideposts and the result dictated by the third guidepost—a tension it found no principled way to resolve. Under the first two guideposts, it believed that the $13 million punitive damage award was proper because, in the court's view, the conduct was sufficiently reprehensible, and the more than 5:1 ratio was acceptable. App. 33a. Yet, under the third guidepost, "$125,000 would be the maximum punitive damage award that could be imposed in this case. . . . because [Chrysler] never had notice that it could be held liable for an amount greater than $125,000." App. 34a-35a.

While the court noted that it was "inclined to give the first two guideposts considerably more weight," App. 36a, it clearly gave the third guidepost *no* weight. The Court candidly expressed its confusion regarding this Court's precedents, admitting that it was "*unsure* how to reconcile the third guidepost with the other two," and noting that it was "unfortunately left with *little guidance* as to how to resolve this discrepancy because both *Gore* and *Campbell* are cases in which all of the guideposts suggest the same result." App. 35a (emphases added). It observed that "[o]ther courts have experienced similar frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether." App. 35a.

As a result, the court analyzed the award under the first and second guideposts, and ignored the third, even while recognizing that the third guidepost would "compel a dramatically different conclusion." App. 33a. Thus, although Chrysler arguably had notice of at most a maximum penalty of $125,000, the court upheld the imposition of a multi-million dollar judgment—the largest judgment it has upheld to date.

3. The Tennessee Supreme Court's confusion regarding application of the comparable penalty guidepost in punitive damage excessiveness review is not unique.[3] To the contrary, it is widespread, and courts are greatly divided on the issue, producing at least five interpretations.

a. Some courts correctly apply Gore's third guidepost to reduce punitive damages to bring them in line with legislative penalties. In *Clark*, the Sixth Circuit drastically reduced a $3 million punitive damage award as "excessive in light of comparable civil penalties." 436 F.3d at 607. "At the time of the truck's design and manufacture, the maximum civil penalty that could be imposed for a design defect was $1,000 per vehicle, up to a maximum of $800,000 for a related series of violations. The $3 million award here is significantly larger than those figures." *Id.* at

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[3] *See, e.g.*, Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 472 (2004) ("[B]oth state and federal courts have grappled with applying the third guidepost with little uniform success."); Victor E. Schwartz, et al., *Selective Due Process: The United States Supreme Court Has Said that Punitive Damages Awards Must be Reviewed for Excessiveness, but Many Courts are Failing to Follow the Letter and Spirit of the Law*, 82 OR. L. REV. 33, 51 (2003) ("Many appellate courts have disregarded and misunderstood the third guidepost.").

608 (citation omitted). Accordingly, the court reduced the punitive award to $471,258.26. *Id.*

In *Lincoln* v. *Case*, 340 F.3d 283, 294 (5th Cir. 2003), involving violations of the Fair Housing Act, the Fifth Circuit remitted a punitive damage award of $100,000 to the statutory maximum civil penalty of $55,000. Likewise, in *Fabri* v. *United Technologies International, Inc.*, 387 F.3d 109, 127 (2d Cir. 2004), the Second Circuit vacated and remanded a punitive damage award where the first two factors were inconclusive but the applicable statutory penalty of $5,000 favored remittance of the $500,000 award. The court noted that the civil penalty was "1/100 of the punitive damages awarded." *Id.* at 126. And in *Bains LLC* v. *Arco Products Co.*, 405 F.3d 764, 777 (9th Cir. 2005), the Ninth Circuit remitted a $5 million punitive damages award in a Section 1981 case to between $300,000 and $450,000 where the comparable statutory penalty authorized by Congress in Title VII was $300,000.

b. In stark contrast, many courts, such as the court below, simply ignore the third guidepost or deem it irrelevant or confusing, even in the face of clear, comparable statutory penalties. In *Willow Inn, Inc.* v. *Public Service Mutual Insurance Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005), the Third Circuit noted that it was "unsure as to how to properly apply" the third guidepost and, despite the fact that the punitive damage award was 30 times as large as the civil penalty, refused to "overturn the punitive damages award on this basis alone." *See also Hangarter* v. *Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) (upholding $5 million punitive damage award without any mention of the third guidepost); *United Phosphorus, Ltd.* v. *Midland Fumigant, Inc.*, 205 F.3d 1219, 1231 (10th Cir. 2000) (upholding substantial punitive damage award although third guidepost "lends credence to a smaller punitive dam-

ages award."); *Harris* v. *Soley*, 756 A.2d 499 (Maine 2000) (upholding punitive damage award without analysis of third guidepost).

Perhaps most strikingly, even courts *on remand from this Court* have felt free to ignore the third guidepost. For example, in *BMW of North America, Inc.* v. *Gore*, 701 So. 2d 507, 514 (Ala. 1997), the Alabama Supreme Court deemed the third factor irrelevant, ignoring the comparable statutory penalty of $2,000, and instead imposing a $50,000 punitive damage award: "Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award, particularly where the defendant is wealthy and the profit gained from the fraudulent act is substantial." The court explained that because "[i]n [that] case, the maximum statutory penalty does not even remove the profit BMW realized from the sale of the damaged automobile to Gore," "a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award." *Id.* Similarly, in *Campbell* v. *State Farm Mutual Automobile Insurance Co.*, 98 P.3d 409 (Utah 2004), on remand from this Court, the Utah Supreme Court upheld a punitive damage award 900 times greater than the comparable statutory penalty. *See also Williams* v. *Aetna Fin. Co.*, 700 N.E. 2d 859, 871 (Oh. 1998) ("[I]t would appear that when one of the guideposts is particularly relevant a lesser reliance on the other guideposts may be justified").

c. In *International Union of Operating Engineers, Local 150* v. *Lowe Excavating Co.*, 870 N.E. 2d 303, 323 (Ill. 2006), the Illinois Supreme Court held that the absence of a comparable civil penalty rendered the third guidepost irrelevant. *See also Paracelsus*, 754 So. 2d at 445 (Mississippi Supreme

Court noting absence of comparable statutory penalty given no weight).

But other courts hold that the absence of a clearly comparable statutory penalty dictates the opposite conclusion—that it is a mitigating factor requiring reduction of the punitive damage award. In *Hamilton*, 122 F.3d 854, for example, the Tenth Circuit held that the lack of comparable statutory civil or criminal penalties required reduction of the punitive damage award. And in *Roberie* v. *VonBokern*, 2006 WL 2454647, at *9 (Ky. Aug. 24, 2006), the Kentucky Supreme Court noted that: "Because we can find no civil penalty for this act, this factor raises more concern than the others."

d. Some courts have ignored the dollar amount of the applicable penalties and instead refer to them merely as an indication of the seriousness of the offense. For example, in *In re Exxon Valdez*, 490 F.3d 1066, 1094 (9th Cir. 2007), *vacated and remanded on other grounds sub nom. Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605 (2008), the Ninth Circuit explained that in its "more recent post-*BMW* v. *Gore* and *State Farm* cases, [that court has] generally not attempted to quantify legislative penalties," but has "looked only to whether or not the misconduct was dealt with seriously under state civil or criminal laws." Thus, the court held that, under the third guidepost, a substantial punitive damage award was warranted because "the matter of spilling oil in navigable water has clearly been taken quite seriously by legislatures." *Id.* *See also Planned Parenthood* v. *Am. Coalition of Life Activists*, 422 F.3d 949, 963 (9th Cir. 2005) (examining statutory fines and stating that "[t]hese penalties indicate that Congress believed that substantial sanctions were appropriate to deter those who interfere with clinic operations."); *Grabinski* v. *Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1027 (8th Cir. 2000) (affirming punitive damage

award where "legislative judgments," including imprisonment, fines, and revocation of license, "weigh heavily in favor of an award of punitive damages"). Likewise, in *Mathias* v. *Accor Economy Lodging*, 347 F.3d 672, 678 (7th Cir. 2003), the Seventh Circuit upheld a punitive award of $186,000 where compensatory damages were only $5,000 because, although the comparable civil penalty was only $2,500, the defendant's operating license could be revoked for the conduct at issue. The court reasoned that "the defendant would prefer to pay the punitive damages assessed in this case than lose its license." *Id.*

e. Some courts have interpreted the third guidepost merely as an amorphous "notice" requirement untethered to the amount of the comparable penalty. In *Zimmerman* v. *Direct Federal Credit Union*, 262 F.3d 70, 83 (1st Cir. 2001), the First Circuit held that "a reviewing court should search for comparisons solely to determine whether a particular defendant was given fair notice as to the potential liability for particular misconduct, not to determine the acceptable range into which an award might fall."

Similarly, in *Johansen* v. *Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), the Eleventh Circuit explained that "[t]here may . . . be a lack of adequate notice if the difference between the civil or criminal penalties that were or could have been imposed and the punitive damage award is too great." *Id.* at 1337 (citing *Gore*, 517 U.S. at 584). The Eleventh Circuit nonetheless upheld a $4.35 million punitive damage award where compensatory damages were only $47,000 and comparable civil penalties were $10,000. *Id.* at 1339.

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The third guidepost is at issue every time a court conducts a constitutional excessiveness review of a

punitive damage award and its interpretation has split the lower courts. If properly applied, it is a crucial part of ensuring that punitive damage awards are kept within constitutional limits. "The . . . problems with the third guidepost are both pervasive and severe," but "[t]he third guidepost can be an integral part of a principled and meaningful guidance system for evaluating punitive damages awards." Chanenson & Gotanda, *supra*, at 477. Moreover, because the amount of comparable penalties is often much lower than the amount of punitive damages imposed by a jury, a proper analysis of the third guidepost will often require courts to decrease punitive damages by millions of dollars. *See, e.g.*, *DiSorbo* v. *Hoy*, 343 F.3d 172, 188 (2d Cir. 2003) (remitting punitive damage award in Section 1983 action from $1.275 million to $75,000 and noting that "[w]hile a year's imprisonment is undoubtedly a substantial punishment, a maximum fine of $1,000 gives little warning that the action could result in a $ 1.275 million punitive damages award.").

As long as the widespread confusion regarding this guidepost continues, defendants will be subjected to grossly excessive and unconstitutional punitive damage awards. The Court, therefore, should grant certiorari.

B. The Opinion Below Also Reflects The Lower Courts' Conflicting Decisions On Whether "Substantial" Compensatory Damages Require a 1:1 Ratio

In *State Farm*, this Court held that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425; *see also Exxon Shipping*, 128 S. Ct. at 2634 n.28 ("[A] class recovery of $500 million is substantial. In this case, then, the

constitutional outer limit may well be 1:1."). The Court further held that the $1 million in compensatory damages awarded in that case was "substantial," and "likely would justify a punitive damages award at or near the amount of compensatory damages." *State Farm*, 538 U.S. at 429. Despite this clear command, the lower courts have reached wildly differing conclusions on when a compensatory damage award is large enough to require that punitive damages be limited to the amount of compensatory damages.

1. The Tennessee Supreme Court discussed this Court's holding that "a ratio of 1 to 1 may be all that is permissible in cases where compensatory damages are 'substantial.'" App. 33a. (citing *State Farm*, 538 U.S. at 425). But it inexplicably did "not believe that a [$2.5 million compensatory damages] award . . . is so large as to require a ratio of 1 to 1." App. 33a. It therefore upheld a punitive damage award of over $13 million—more than five times the amount of compensatory damages. App. 33a.

The Ninth and Eleventh Circuits have done the same. *See Hangarter*, 373 F.3d at 1014-15 (holding $5 million punitive damage award not excessive even though compensatory damages were $2.7 million); *Action Marine, Inc.* v. *Cont'l Carbon Inc.*, 481 F.3d 1302, 1322 & n.24 (11th Cir. 2007) (upholding $17.5 million punitive award despite compensatory damages and attorneys' fees of $3.2 million).[4] These

[4] Indeed, a few cases, in both the Ninth and Eleventh Circuits, have even acknowledged that compensatory damages were "substantial," but nonetheless declined to apply a 1:1 ratio. *See, e.g.*, *Planned Parenthood*, 422 F.3d at 963 (9:1 ratio was appropriate, even though "[m]ost of the compensatory awards are substantial"); *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (noting that $2.1 million compensatory damage was substantial but allowing 4:1 ratio).

courts have noted the Court's statement in *State Farm*, but nonetheless found it inapplicable, despite the compensatory damages in both cases being far greater than in *State Farm*. *Hangarter*, 373 F.3d at 1014-15 (quoting *State Farm*, but not following it because this Court "decline[d] . . . to impose a bright-line ratio which a punitive damages award cannot exceed"); *Action Marine*, 481 F.3d at 1322 & n.24 (holding the Court's instruction regarding "substantial" compensatory damages was "not binding," and concluding that the facts "compel[led] application of what the Court may *someday* unequivocally endorse as the rare exception" (emphasis added)).

2. These holdings are in direct conflict with other courts that have followed this Court's instruction that punitive damages should be limited to the amount of compensatory damages when the compensatory award is substantial.

The Eighth Circuit has, on multiple occasions, reduced punitive damages to the amount of compensatory damages when the plaintiff was awarded a six- or seven-figure compensatory award. *See, e.g.*, *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing punitive damages to equal $600,000 compensatory damages).[5] The law is the same in the Third and Sixth Circuits, which have both expressly adopted the standards in *Williams* v. *ConAngra*. *See, e.g.*, *Jurinko* v. *Med. Protective Co.*, 2008 WL 5378011, at *11 (3d Cir. Dec. 24, 2008) (explicitly adopting Sixth and Eighth Circuits' law and holding that $1.65 million compensatory verdict in bad-faith insurance case was "substantial," and re-

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[5] *See also Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (finding that compensatory damage award of approximately $4 million was sufficiently substantial to justify one-to-one ratio of punitive damages).

quired reduction of $6.25 million punitive damage verdict to amount equal to compensatory damages); *Bach*, 486 F.3d at 156-57 (holding $400,000 compensatory damage award was "substantial" and remitting $2.2 million punitive damages award to $400,000).[6]

3. Commentators have noted this division in the lower courts' application of the ratio guidepost, particularly with respect to "substantial" compensatory damage awards. *See, e.g.*, Lauren R. Goldman & Nickolai G. Levin, *State Farm at Three: Lower Courts' Application of the Ratio Guidepost*, 2 N.Y.U. J. L. & BUS. 509, 513, 534-35, 546 (2006) ("[T]he lower courts have all but ignored State Farm's recommendation that a reduction of punitive damages to a level at or near compensatory damages might be warranted when the compensatory award is objec-

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[6] *See also Bridgeport Music, Inc.* v. *Justin Combs Publ'g*, 507 F.3d 470, 488-89 (6th Cir. 2007) (following *Bach* and holding that "a ratio of closer to 1:1 or 2:1 is all that due process can tolerate" where $400,000 compensatory damages were "substantial"). District courts in the Second Circuit have followed these courts as well, *see, e.g.*, *Thomas* v. *iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007) (holding that punitive damages should not exceed compensatory damages "because [plaintiff] was awarded a very substantial amount in compensatory damages"), as have several state courts, *see, e.g.*, *Hudgins* v. *Sw. Airlines, Co.*, 2009 WL 73251, at *15 (Ariz. Ct. App. January 13, 2009); *Jet Source Charter, Inc.* v. *Doherty*, 148 Cal. App. 4th 1, 10 (2007) (remanding $26 million punitive award to trial court with instructions to limit the award to amount not exceeding total compensatory damages awarded, $6.5 million); *Walker* v. *Farmers Ins. Exch.*, 153 Cal. App. 4th 965, 974 (2007) (affirming remittitur of $8 million punitive award to $1.5 million, equal to compensatory damages); *Burns* v. *Prudential Sec., Inc.*, 857 N.E.2d 621, 652 (Ohio Ct. App. 2006) (reducing punitive award from $250 million to $6.8 million where compensatory damages were approximately $6 million).

tively substantial (e.g., above $500,000), typically upholding ratios between 1:1 and 4:1 and occasionally even higher in such cases."); *see also* 4 Bus. & Com. Litig. Fed. Cts. § 42:63 (2d ed.) (surveying cases). Although many lower courts have obeyed this Court's injunction that punitive awards rarely should exceed a single-digit multiple of compensatory damages, *see generally* Goldman & Levin, *supra*, at 533-34, few have taken to heart the Court's pronouncement that, when compensatory damages are "substantial," a 1:1 ratio may be the constitutional maximum. *See id.* at 510; 4 Bus. & Com. Litig. Fed. Cts. § 42:63.

Recently, in *Exxon Shipping Co.* v. *Baker*, this Court further explained the purpose of the rule it announced in *State Farm*. The Court reiterated that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" 128 S. Ct. at 2634 n.28 (quoting *State Farm*, 538 U.S. at 425). "The criterion of 'substantial' takes into account the role of punitive damages *to induce legal action* when pure compensation may not be enough to encourage suit." 128 S. Ct. at 2634 n.28 (emphasis added).

* * *

The Tennessee Supreme Court, like the Ninth and Eleventh Circuits, stands in direct conflict both with this Court's holding in *State Farm*, and with several other lower courts that have followed *State Farm*. Multi-million dollar compensatory damage awards are unquestionably sufficient "to induce legal action." *Exxon Shipping*, 128 S. Ct. at 2634 n.28. As a result, exceeding a 1:1 ratio in cases such as this is unjustified. This principle is nonetheless the subject

of much confusion among the lower courts. Review is therefore warranted to reiterate and clarify what counts as "substantial" within this Court's mandate in *State Farm*.

III. AT A MINIMUM, THE COURT SHOULD HOLD THIS CASE PENDING *PHILLIP MORRIS* V. *WILLIAMS II*

Philip Morris USA v. *Williams* holds that a defendant cannot be charged with punitive damages based on harm to parties not before the court: "[T]he Constitution's Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." 549 U.S. at 353. Although harm to nonparties may in some circumstances potentially be relevant to the reprehensibility of a defendant's conduct, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 355.

The trial court in this case admitted evidence of 37 accidents involving nonparties it deemed "similar" to the Respondents' accident, 25 of which occurred after the sale of Respondents' vehicle. Respondents also repeatedly told the jury that if they did not impose a substantial punitive damage award, they would be personally responsible for the deaths of other children and adults. Chrysler objected to this evidence and argument in the trial court, argued in its post-trial motions this warranted a new trial, and made the same argument before the Court of Appeals and the Tennessee Supreme Court. App. 207a, 214a, 226a, 259a. Chrysler *also* argued that the trial court's failure to instruct the jury not to consider this evidence was error and warranted a new trial,

though it did not clearly raise this as a separate argument before the Court of Appeals. App. 259a.

The Tennessee Supreme Court refused to consider Chrysler's nonparty harm argument, however, because it found that Chrysler did not raise an *instructional error* argument in the Court of Appeals. As Justice Koch noted in dissent, however, this ignored Chrysler's broader argument, clearly grounded in the *Philip Morris* decision, that punitive damages based on harm to nonparties is unconstitutional. App. 62a n.16. There is no question that Chrysler fully preserved this argument.

In finding Chrysler's constitutional challenge "waived," the Tennessee court took an extremely narrow view of the substance of the *Philip Morris* decision, and an exceedingly broad view of Tennessee's procedural bar. The court necessarily concluded *sub silentio* that, under *Philip Morris*, the constitutional issues posed by basing punitive damages on alleged harms to nonparties is exclusively one of jury instructions. But this is incorrect. *Philip Morris* did not reach the instructional issue at all. *See* 549 U.S. at 357-58. The Tennessee Supreme Court fashioned a procedural bar that waived the entire argument based on Chrysler's alleged failure to make a subset of the argument—an exclusively instructional issue—to the Court of Appeals, a rule for which there is no apparent precedent.[7]

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[7] The court cited *Brown* v. *Crown Equipment Corp.*, 181 S.W.3d 268, 281 n.5 (Tenn. 2005), and *Virginia & Southwestern Railroad Co.* v. *Sutherland*, 197 S.W. 863, 864 (Tenn. 1917), but in both cases the party failed to raise the issue *at all*. There is no apparent Tennessee authority for the Court's failure to consider an issue that was simply framed differently in the Court of Appeals.

This closely resembles the error the Oregon Supreme Court made on remand in *Williams* v. *Philip Morris Inc.*, 176 P.3d 1255, 1261-62 (Or. 2008), and review is warranted for the same reasons. The adequacy of a state-law bar to a due process challenge is "itself a federal question," *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965), and because the Tennessee Supreme Court's ruling misinterpreted this Court's due process precedents, it was not an independent or adequate ground for the judgment. *See NAACP* v. *Alabama*, 357 U.S. 449, 455 (1958). Consequently, this Court should, at a minimum, hold this case pending its decision in *Philip Morris USA* v. *Williams*, No. 07-1216 (U.S.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 10, 2009